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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 217.

CLINTON FOODS, INC., a Delaware Corporation,
Petitioner,

v.

MARVIN YOUNGS,
Respondent.

REPLY TO RESPONDENT'S STATEMENT IN RESISTANCE.

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FOREWORD.

Petitioner feels that respondent's Statement in Resistance fails to respond to the issue which we attempted to state in our Petition. Rather it constitutes an attempt to evade the issue here involved by continuing the method practiced throughout the appeal of misstating, by abridging, the petitioner's contentions, and asking that the matter be determined upon the limited issue of the nature of the warning given and the claim that the warnings were inadequate in

that they were not received by respondent personally and were not specific enough to warn respondent personally. The phases of the issue here presented: as to whether the foreman knew of the danger independent of warnings, and whether the warnings, if necessary, were received and appreciated by the foreman, are completely ignored as they have been heretofore by respondent and by the Court of Appeals.

We shall, herein, endeavor to reply to respondent's divisions denominated, respectively, "Statement" and "Reasons for Not Granting the Writ."

REPLY TO STATEMENT.

In the division entitled Statement, the respondent discusses the question of adequacy of any warnings and sets up certain standards which, he asserts, are requisites of a warning.

We cannot quarrel with the standards thus set up, as an abstract proposition. However, the issue presented in our Petition is based not upon the specific warning or any magic words thereof which qualify it as adequate, but upon a number of warnings of diverse character which were received by the employer through its foreman, Mr. Morgan, and the fact that they were sufficient as Morgan's testimony discloses. If they were not, it is clear that no duty to warn was imposed, because, from some source, Morgan was unquestionably aware of the danger.

Mr. Morgan testified that "I personally knew that these transformers were hot" (R. page 20), and acknowledged recalling that in a prior deposition he had responded to a question "Did you have any conversation with your men about the **wires**?" by reply, "I told them they were hot and the transformers were all hot" (R. page 21). It is certain that Morgan was aware of the very danger which

caused respondent's injuries, and it matters not whether he was aware because of, despite, or independently of, the warnings. Therefore, whether the warnings were such that they would have apprised someone other than Morgan of the danger is immaterial. Either they accomplished their purpose or they were unnecessary.

Petitioner was not "in active supervision of that work" at all times, as alleged, except to the extent indicated by the testimony of its employee, Shannon, that it was his "particular job to see that the pipeline was **in accordance with specifications**" (R. page 10). That is the traditional supervision reserved by anyone who engages a contractor. That there was no supervision over either methods or employees is shown by the stipulations "that under the contract between Clinton Foods, Inc., and Pittsburgh Piping and Equipment Company under which the plaintiff was performing work, Pittsburgh Piping and Equipment Company occupied the status of an independent contractor" (R. page 33), and that Pittsburgh, in connection with the work, "shall furnish all labor and materials, tools, supervision and methods as outlined in the specifications equipment and transportation necessary for the proper execution of the work" (R. pages 33-34).

It is not only untrue that petitioner was "frequently calling attention to the presence of an exposed bus bar" throughout the progress of the work, as alleged, but the record shows clearly that **no** representative of petitioner warned **any** employee of Pittsburgh of the bus bar during the time respondent was in the area, and **no** employee of petitioner **ever** warned respondent about the bus bar. The references to the record which support the latter assertions appear on pages 104, 105, 106 and 107 of the Appendix to our Petition.

Respondent apparently likens the decision of the Court of Appeals to a jury verdict; and takes the position that if

an issue has been raised, it must have been considered. Unlike a jury verdict, the "decision" is supported by an opinion. There is no basis for a presumption similar to that indulged as to what inheres in a verdict, because the opinion speaks for itself as to what has been considered.

REPLY TO REASONS FOR NOT GRANTING THE WRIT.

Both of the numbered reasons, **if correct**, would be valid reasons for not granting the writ. We submit that they do not accord with the true situation.

Understandably, respondent adopts the Court's expressed view of the nature, and limit, of our contentions. The pronouncement of this view is precisely the point upon which we base our petition. We consistently and repeatedly, at every opportunity, raised the issue of the contractor's knowledge and the legal effect thereof. Ours was never a "two-fold" position. It is true that respondent adopted an ostrich-like approach to the issue which is now the only one involved by neither answering it nor even referring to it during the appeal, and apparently hoped that by pretending that it did not exist, it would go away. We seek the review of this Court because apparently that's precisely what it did.

The majority opinion (page 15 of the Appendix, page 92 of the Transcript of Record) holds that "the crucial question is—Do the facts establish, as a matter of law, that **plaintiff** was adequately warned or was aware of the dangerous instrumentality which caused his injury, or in the exercise of ordinary care **on his part**, could **he** have discovered such danger?" (emphasis supplied). The majority further held (page 22 of the Appendix, page 95 of the Transcript of Record) that plaintiff's knowledge, as a reasonable man, would not, as a matter of law, bar his recovery. Finally (page 23 of the Appendix, page 96 of the

Transcript of Record), the majority held that the jury could reasonably have found "that plaintiff did not have **actual knowledge**" (emphasis supplied).

We submit that these statements, coupled with the incorrect and misleading reference as to petitioner's "two-fold" position and the complete failure to mention either the facts, or the contentions, as to what Morgan or Pittsburgh knew, show conclusively that we have not been accorded determination of the decisive point of law urged.

Assuming that we have established that position, reason numbered 2 is based upon a false premise. This is not, so far as material hereto, a fact case. Rather it is a case wherein the Court of Appeals—by default as it were—has rendered an opinion which is misleading as to the validity of a legal defense, because it fails to apprise the public of its refusal to accept a rule which is generally accepted. We submit that the public interest is apparent.

CONCLUSION.

For the reasons stated in our Petition, and in light of respondent's failure to adequately answer them, we pray the issuance of a writ.

Respectfully submitted,

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